

Before the
Federal Communications Commission
Washington, D.C. 20554

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JUN 19 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition for Declaratory Ruling to) CC Docket No. 98-62
Declare Unlawful Certain RFP)
Practices by Ameritech)

REPLY COMMENTS

I. Introduction

The comments received in this proceeding were not surprising. The Bell Operating Companies (BOCs), for the most part, provided comments not on the specifics of the particular arrangement proposed by Ameritech, but arguments supporting the fact that a teaming arrangement between a BOC and an Interexchange Company (IXC) to market interLATA and local services is permissible pursuant to the current statutory environment and opinions issued by the Commission on analogous matters. The IXCs and Competitive Local Exchange Carriers (CLECs) submitted comments arguing that the proposed arrangement, and any like it, would violate pertinent sections of the Telecommunications Act of 1996 (1996 Act). Although numerous pages of comments were submitted to the Commission, the issue boils down to whether a BOC and an IXC can enter into a legal arrangement, i.e., one that complies with 47 U.S.C. §§ 251(g) and 271, in which the BOC markets interLATA services on behalf of the IXC.¹ An objective analysis of the issues and the relevant authority fully support that they can.

¹ An abbreviated procedural history is appropriate. Subsequent to Sprint filing its petition in this proceeding, U S WEST entered into a teaming agreement with Qwest Corporation (Qwest) to market interLATA services on behalf of Qwest. Although the details were significantly different, the U S WEST/Sprint agreement presented the same issues that the Request for Proposal (RFP) issued by Ameritech presents in this proceeding. AT&T and other plaintiffs filed suit in the Federal District Court for the Western District of Washington seeking among

II. Teaming Arrangements In Which a BOC Markets the InterLATA Services of an IXC are Permissible.

Albert Einstein once said "make everything as simple as possible, but not simpler." At the risk of violating Mr. Einstein's edict, the ultimate issue presented by the RFP that is the subject of this docket and the subsequent agreements entered by U S WEST and Ameritech can be resolved by answering two questions: Can a teaming arrangement in which a BOC markets interLATA services on behalf of an IXC comply with the equal access requirement of § 251(g) and will such a teaming arrangement amount to "providing" interLATA services which is prohibited by § 271? The answers to those questions, respectively, are yes and no.

A. Teaming Arrangements Comply with Equal Access Obligations of the BOC.

As acknowledged by most comments, including BellSouth's, § 251(g) imposes the same equal access requirements on BOCs as applied under the Modified Final Judgment (MFJ).²

other things an order declaring the arrangement unlawful and an injunction halting the parties from carrying out the agreement. AT&T Corp., et al. v. U S WEST, No. C98-634 WD (W.D. Wash., filed May 13, 1998) ("U S West "). After a hearing, the court granted a preliminary injunction against U S WEST and referred the issue of the legality of the relationship to the Commission on the basis of primary jurisdiction.

Ameritech later announced that it had entered a similar agreement to market the interLATA services of Qwest. The terms and conditions of the agreement differ from those set forth in the RFP, however, the permissibility of the type of relationship it establishes remains the same. AT&T and other plaintiffs also filed a suit against Ameritech seeking essentially the same relief requested against U S WEST. AT&T Corp., et al. v. Ameritech, No.98C-2993 (N.D. Ill., filed May 14, 1998). As in the U S WEST case, a hearing was held on the issue of primary jurisdiction and injunction relief. The Illinois court referred the legality of the arrangement to the Commission, however, unlike the Washington court, refused to grant an injunction.

Given these procedural events, the relief sought by Sprint in this docket is obviously moot. BellSouth's reply comments, just as with its comments, do not address the specific details of Ameritech's RFP, but focus on the same issues referred to the Commission by both the Washington court and the Illinois court which is the overall legality of the type of teaming arrangement proposed by Ameritech.

² See, e.g., Comments of McLeod USA, Incorporated, Focal Communications, Incorporated, ICQ Communications, Inc. and KMC Telecom, Inc. (hereinafter "McLeod USA Comments") at 10; Comments of MCI Telecommunications Corporation (hereinafter "MCI Comments") at 12 *et seq.*; Comments of the Telecommunications Resellers Association (hereinafter "TRA Comments") at 6; Comments of U S WEST Communications, Inc. (hereinafter "U S WEST Comments") at 11; Memorandum of Points and Authorities In Support of Motion for Temporary

Consequently, the concept of equal access is not new to the BOCs. Indeed, they have operated under these equal access requirements from the time of their creation. During this time frame they have entered permissible teaming arrangements with IXC's. These arrangements complied with the equal access restrictions placed on them by the MFJ.³ Nothing in the 1996 Act limits a BOC from continuing the practice of teaming with an IXC as long as it complies with the equal access requirements. In fact, the Commission has settled this issue and therefore requires no further debate.⁴

BellSouth accepts, however, there is a difference between the teaming arrangements that have been consummated between BOCs and IXC's in the past and the one that is the subject of this dispute -- namely past arrangements did not include "marketing" of interLATA services by a BOC. If, however, a BOC and an IXC could enter a permissible teaming arrangement that includes the marketing of interLATA services, (see discussion set forth in II. B., below) then, in accordance with past and current authority, such a teaming arrangement could be structured to meet equal access obligations. Thus, the answer to the first question posed, and summarily answered above, is that equal access obligations of § 251(g) can be satisfied for the type of teaming arrangement contemplated.

B. Marketing of InterLATA Services Does Not Equate to Providing InterLATA Service.

The significant issue that must be decided is whether a BOC can market interLATA services for an IXC. The comments filed by the IXC's and CLECs argue that marketing of

Restraining Order or, In the Alternative, Preliminary Injunction On An Expedited Basis (hereinafter "AT&T Memorandum"), filed in U S WEST, supra, n. 1, at 25 *et seq.* AT&T filed a copy of this Memorandum with its Comments.

³ Comments of BellSouth Corporation and BellSouth Telecommunications, Inc. (hereinafter "BellSouth Comments") at 2.

⁴ See, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 22047 [¶293] (1996).

interLATA services by a BOC is prohibited by the 1996 Act. These groups rely on § 271 which states that a BOC “may [not] provide interLATA services...” until it receives authority from the Commission to do so.⁵ They argue that the term “provide” is inclusive of “marketing” activities, and therefore prohibited. The basis for this argument is past court precedents that interpreted similar provisions in the MFJ. As U S WEST points out in its comments, however, those court precedents are not controlling over the 1996 Act.⁶

Without belaboring the point, in passing the 1996 Act Congress did not incorporate the restrictions regarding these similar provisions of the MFJ into § 271. Had it been Congress’ intent to include the MFJ restrictions regarding the provision of interLATA services, it no doubt would have constructed § 271 just as it did § 251(g), which specifically incorporates the equal access provisions of the MFJ into the 1996 Act. Thus, the argument that the Commission must apply the same meaning to “provide” or “provision of” services to § 271 of the 1996 Act as was applied to the MFJ is fallacious.

Section 601(a) of the 1996 Act clearly eradicated the MFJ and placed governance of the industry under the adopted statutes of the 1996 Act. In doing so, Congress enacted different line-of-business restrictions from those established by the MFJ. These differences relate to fundamental issues that constitute the line-of-business restrictions including the very definition of a BOC.⁷ Congress chose not to enact the same restrictions that applied to the MFJ into the 1996 Act for good reason. The Act radically changed the industry. Through § 271 it provides for the removal of barriers for a BOC to enter the interLATA business. Moreover, it abolished

⁵ AT&T Memorandum at 16-25; TRA Comments at 6; MCI Comments at 7-12; McLeod USA Comments at 8-10.

⁶ U S WEST’s Comments at 4-6.

⁷ For example, the MFJ definition of a BOC included affiliates, while the 1996 Act definition does not include affiliates.

all barriers to local exchange competition. Accordingly, with aforethought and good reason, Congress chose to adopt statutes that appropriately address the industry today and not merely carry forward the same restrictions of the past.

Indeed, the Commission clearly recognized this fact in the release of the Alarm Monitoring Order⁸, which addressed an analogous section of the 1996 Act regarding the “provision of” alarm monitoring services.⁹ As noted in BellSouth’s comments, in the Alarm Monitoring Order the Commission interpreted the issue of what constitutes “providing” services as not including the “marketing” of those services.¹⁰ Under this interpretation, a BOC could team with an IXC to market the IXC’s services without being in violation of § 271 of the 1996 Act.

In response to the Alarm Monitoring Order, several of the comments suggested that the Commission should adopt different meanings to the concept of “providing services” as set forth in § 271 from that set forth in § 275.¹¹ Such an argument is nonsensical. Either “provide” means what the Commission said that it means in the Alarm Monitoring Order or that Order is

⁸ Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, 12 FCC Rcd 3824 (1997), vacated on other grounds, Alarm Indus. Communications Comm. v. FCC, 131 F.3d 1066 (D.C. Cir. 1997).

⁹ The wording in the different sections of the statute regarding providing services differs slightly. Section 271 states that a “BOC...may [not] provide interLATA services...”, while § 275 states that a “BOC...may [not] engage in the provision of alarm monitoring services....” Several of the Comments contended that Congress’ use of “provide” versus “engage in the provision of” somehow was an attempt to give the phrases different meanings. Nothing in the statute, however, suggests such intent. Moreover, the dictionary clearly defines “provide” to mean “to furnish; supply” and “provision” to mean “the act of supplying...”, thus, the meanings are the same. The American Heritage Dictionary, 997,998 (2d College ed. 1991)

¹⁰ BellSouth Comments at 4-5.

¹¹ MCI Comments at 11-12; AT&T Reply Memorandum at 18-20.

wrong.¹² To attempt to equate different meanings to standard language in the statute would be the statutory interpretation equivalent of "Who's on First".¹³

Based on the foregoing, the Commission has established that a BOC may market the interLATA services of an IXC and not be in violation of § 271's prohibition against providing services. Therefore, the Commission should not obfuscate the issue by applying different meanings to the same terms used in § 271 and § 275 of the 1996 Act. This is especially true in the light of the fact that the Commission is under no compulsion to apply a meaning based on precedents that interpreted the MFJ. Accordingly, the answer to the second question posed earlier, i.e., will the proposed teaming arrangement in which a BOC markets the interLATA services for an IXC amount to "providing" interLATA services which is prohibited by § 271, is no. Thus, such an arrangement is permissible.

Conclusion

Because a teaming arrangement in which a BOC markets the interLATA services for an IXC can be entered in accordance with the equal access requirements of § 251 and because such

¹² This is the only conclusion that can be reached given the wording of the statute. See also, Reply Memorandum of AT&T Corp. In Support of Motion for Preliminary Injunction (hereinafter "AT&T Reply Memorandum") filed in U S WEST, supra, n.1, at 20. AT&T filed a copy of this Memorandum with its Comments.

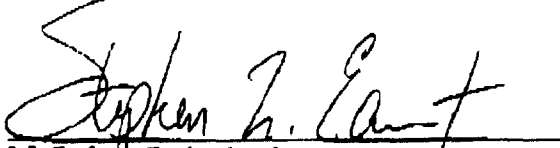
¹³ Bud Abbott and Lou Costello comedy routine about baseball in which the pair illustrated the utter confusion that could occur when people applied a different understanding to the meaning of common words.

an arrangement will not equate to providing interLATA services, the Commission should not issue an order that would generally impede such arrangements.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.
BELLSOUTH CORPORATION

By their Attorneys:

A handwritten signature in dark ink, appearing to read "Stephen L. Earnest", is written over a horizontal line.

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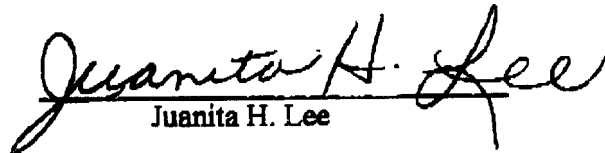
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CERTIFICATE OF SERVICE

I do hereby certify that I have this 19th day of June 1998 served the following parties to this action with a copy of the foregoing REPLY COMMENTS by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties list on the attached service list.



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